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GUN CONTROL—RECENT LEGISLATIVE DEVELOPMENTS

In August, 1973, Governor Walker signed into law a bill¹ amending the Illinois Criminal Code.² The intent and purpose of the Bill is to restrict the manufacture and sale of certain handguns within the boundaries of the state. The thrust of the amendment, as characterized by its sponsors, is to help reduce the incidence of crime in urban areas, while at the same time, to protect the right of the people of the state to own guns. In order to effectuate this policy, the legislation has as its objective the removal of the cheap "Saturday night special" from general circulation by making illegal the manufacture and sale of any handgun "having a barrel, slide, frame, or receiver which is a die casting of zinc alloy or any other non-homogeneous metal which will melt or deform at a temperature of less than 800° Fahrenheit."³

Supporters of the amendment contend that the diecast alloy gun frame might cost as little as one-twentieth of the cost of conventionally made frames using steel, but that this process is suitable only for low melting temperature zinc alloys.⁴ By prohibiting the sale of guns made from the alloyed substance, it is hoped that manufacturers will be unable to sell handguns as cheaply. As a result, many persons who might otherwise be tempted to make the casual purchase of such a low cost "junk" handgun, [estimated to comprise nearly twenty-five per cent of all handguns sold], will not do so.⁵ The amendatory legislation makes no provision for the confiscation of handguns currently in circulation which fall within the prohibition of this new legislation.

In order to evaluate the impact of this legislation, it is necessary to discuss briefly the framework and background against which the new law is set, including other statutory regulations in the gun control area presently in effect.

1. H.B. 1058, 78th Ill. Gen. Assembly (1973).

2. H.B. 1058, 78th Ill. Gen. Assembly (1973). P.A. 78-355 (effective October 1, 1973), amending ILL. REV. STAT. ch. 38, § 24-3 (Supp. 1972).

3. H.B. 1058, § 1(h), 78th Ill. Gen. Assembly (1973). P.A. 78-355 (effective October 1, 1973), amending ILL. REV. STAT. ch. 38, § 24-3 (Supp. 1972).

4. Wheeler, *Move to Ban Saturday Night Specials*, Chicago Sun-Times, April 10, 1973, at 10, col. 10.

5. *Id.*

According to a comprehensive staff study-report to the National Commission on the Causes and Prevention of Violence,⁶ the availability of guns contributes substantially to violence in American society. Although the assassinations of President Kennedy, Senator Robert Kennedy, and Rev. Martin Luther King during the 1960's inspired the current interest in attempts to curtail and restrict the use and availability of firearms, a glance at recent statistics provides a vivid illustration of the intimate relationship between guns and violence. Firearms are a predominant ingredient in violent American crime. Two out of every three homicides are committed with guns, fifty-four percent are committed with handguns.⁷ One out of every three robberies (two out of every three armed robberies) is committed with a gun; further, the incidence of armed robbery has increased 112 percent since 1967.⁸ Between 1968 and 1972, 72.5 percent of all police officers killed in the line of duty were killed with handguns.⁹

It has also been established that firearms are used to a great extent in cases of accidental injury and acts of self-destruction. Every year almost half of the 20,000 suicides committed in America are committed by using firearms.¹⁰ Americans are currently dying from firearms accidents at a rate of about 2,900 per year; another 20,000 persons suffer accidental injuries each year from firearms.

It is because of these alarming statistics that lawmakers have endeavored to create legislation which will have the effect of restricting the unlawful and oftentimes tragic accidental use of firearms. The most common restriction encountered in such legislation regulates the carrying of firearms, and the place and manner in which such firearms can be used.¹¹ Also prevalent are prohibitions which make it illegal for certain categories of individuals to possess firearms. In Illinois, possession of a firearm is considered unlawful by any person under the age of 21 who has been convicted of a misdemeanor; by a convicted felon during the five-year period after his conviction; by any person under 18 years of age in possession of a handgun; by any narcotic addict; by persons having been released from a mental institution within the last five years; or by any

6. G. NEWTON & F. ZIMRING, *FIREARMS AND VIOLENCE IN AMERICAN LIFE* (1969).

7. F.B.I., *UNIFORM CRIME REP.* 6 (1973).

8. *Id.*

9. *Id.* at 43.

10. G. NEWTON & F. ZIMRING, *supra* note 6, at 33.

11. *See, e.g.*, ILL. REV. STAT. ch. 38, § 24-1 (Supp. 1972).

person who is mentally retarded.¹² Although an Illinois resident may not buy or receive a gun without first applying for and being issued a Firearm Owner's Identification card,¹³ it should be noted that the sole criterion used by the state in issuing the card is whether or not a person is a member of one of the categories set out above.¹⁴ No further inquiry is conducted into the reason why the gun is being purchased or the use to which it will be put.

Dealers of firearms are required to keep records of all guns sold, such as the name of the person buying the gun,¹⁵ but such information is not forwarded to either state or municipal law enforcement agencies, unless it is specifically requested. This is not the procedure, however, within the city of Chicago. The Municipal Code of Chicago sets out more stringent procedures than the state statute because it requires mandatory registration of all handguns.¹⁶ If it is found that a gun owner falls into one of the categories ineligible for possession,¹⁷ he will not receive a registration certificate for the firearm and he is required to deliver the firearm to the police department.¹⁸ Information given by the gun owner in connection with applying for a registration certificate, such as his name, occupation, physical description, the serial number of the gun, and the purpose for which it is bought, is automatically turned over to the Chicago Police Department.¹⁹ Thus, pursuant to state laws, all persons applying for a card entitling them to acquire guns are on record with the state, but the state has no record of which of these persons actually possess a firearm. In Chicago, however, a record is kept of each firearm acquired as well as who, in fact, is in possession of it.

Although these measures, especially those enacted in Chicago, are calculated to reduce the violence caused by handguns, it appears that the frequency of crimes involving the use of handguns has continued unabated

12. ILL. REV. STAT. ch. 38, § 24-3.1 (Supp. 1972).

13. ILL. REV. STAT. ch. 38, § 83-2 (1971).

14. ILL. REV. STAT. ch. 38, § 83-8 (1971).

15. ILL. REV. STAT. ch. 38, § 24-4 (Supp. 1972).

16. Branch 27 of the Circuit Court of Cook County hears all cases pertaining to violations of the Illinois and City of Chicago firearms control statutes when such offense is committed in Cook County. The court hears approximately 12,000 cases per year for violations of firearms control statutes.

17. CHICAGO, ILL., MUNICIPAL CODE ch. 11.1, § 11.1-15 (1972).

18. CHICAGO, ILL., MUNICIPAL CODE ch. 11.1, § 11.1-11 (1972).

19. CHICAGO, ILL., MUNICIPAL CODE ch. 11.1, § 11.1-11 (1972). If the seller is a weapons dealer, he must submit the information concerning the buyer required by the ordinance to the City Collector who, in turn, relays it to the Police Department. If the seller is not a dealer, the buyer then has the burden of submitting the information to the city.

and, in fact, has increased over the past five years.²⁰ This is the result of a national firearms policy that is unwilling to prohibit possession of handguns or to make a genuine effort to control the illegal movement of handguns between state boundaries, thus defeating local efforts to alleviate the problem.

The United States lacked any national firearms legislation until Congress enacted the National Firearms Act in 1934,²¹ on the heels of national indignation caused by the violent machine gun battles between federal agents and John Dillinger, and other gangland kidnappings and massacres. It was basically a revenue licensing measure, imposing a heavy tax on the transfer of certain specified weapons,²² and a similar occupational tax on manufacturers, importers, and dealers. Furthermore, anyone owning a firearm covered by the statute was required to register the gun unless he had in effect registered it by paying the required tax.²³

In an effort to further curtail the flow of weapons into undesirable hands, Congress passed the Federal Firearms Act of 1938.²⁴ This Act, which applied to all firearms, prohibited dealers and manufacturers from shipping any firearm in interstate commerce to a felon, a fugitive from justice, a person under indictment, or to anyone not having a license to purchase, if such license were required by local law. In addition, dealers were required to maintain permanent records of firearms which they received and sold and to obtain a federal license before shipping these weapons in interstate commerce.

Both of these federal statutes proved ineffective in reducing the amount of violence resulting from the use of firearms. Since the 1934 Act did not apply to handguns, the weapon most often used in the commission of a crime, its net effect was not widely felt. The licensing provisions of the 1938 Act proved to be the loophole which nullified the remainder of the Act because all persons who applied for a dealers license under the statute obtained one, due to a lack of restrictions on eligibility for it. Each licensee was then entitled to ship firearms interstate without regard to any existing state licensing procedures, whether or not the so-called dealer was actually in the business of selling guns.

No additional federal firearms laws were enacted until the assassina-

20. See notes 7-9 and accompanying text *supra*. See also Appendix A.

21. 26 U.S.C. §§ 5801-5862 (1970).

22. *Id.* (machine guns, short barrelled rifles and shotguns, and silencers).

23. 26 U.S.C. § 5841 (1970).

24. Act of June 30, 1938, ch. 850, 64 Stat. 1250 (repealed in 1968 with the majority of its provisions incorporated in the Gun Control Act of 1968, 18 U.S.C. §§ 921-928 (1970)).

tions of John and Robert Kennedy and Rev. Martin Luther King during the 1960's which prompted the passage of the Gun Control Act of 1968.²⁵ The primary purpose of the statute was to restrict more effectively the interstate flow of guns and thus to prevent the frustration of attempts to control guns at the state and local level. The section of primary importance in the Act provides that no one *except* licensed manufacturers, dealers, and importers may engage in the business of importing, manufacturing, or dealing in firearms or ammunition and that only such licensed persons may ship, transport, or receive any firearm or ammunition in interstate commerce.²⁶ The Act reflects the underlying federal policy of using federal power to curtail interstate commerce in firearms while, at the same time, leaving each state free to adopt the degree of control over firearms that it sees fit.²⁷ This effort to eliminate the free movement of firearms in interstate commerce will hopefully enable local legislation to become more effective.

The proponents of more restrictive gun control laws believe that increased measures are necessary to stem the rising rate of crimes and accidents involving firearms, while the advocates of less stringent measures argue that additional legislation is not the solution, and further that some measures may be unconstitutional. The constitutional arguments of the latter group are usually based on the second amendment which provides that "the right to keep and bear arms shall not be infringed." In addition, firearms statutes which would require registration or filing of specific information with federal or state authorities may violate the fifth amendment privilege against self incrimination.

The United States Supreme Court has consistently interpreted the second amendment as a prohibition against federal interference with the state militia and *not* as a guarantee of an individual's right to bear arms. In *Presser v. Illinois*²⁸ the Court held that an Illinois statute (forbidding bodies of men from associating together as military organizations or drilling or parading with arms in cities and towns unless authorized by law) did not violate the second amendment. The Court stated "[the] conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of Congress and the national government and not upon

25. 18 U.S.C. §§ 921-928 (1970).

26. 18 U.S.C. § 922 (1970).

27. Researchers have discovered that there is a positive correlation between the amount of crime in a given area and the strictness of handgun prohibitions. See *Handgun Liberals*, PARADE MAGAZINE, November 11, 1973, at 24.

28. 116 U.S. 252 (1886).

that of the states."²⁹ Consequently, the states do have the authority to enact legislation which impairs an individual's right to bear arms.

The right of the federal government to enact legislation which in some way impairs an individual's right to bear arms was extended in 1939 in *United States v. Miller*,³⁰ in which the Supreme Court upheld the National Firearms Act of 1934, in the face of a second amendment challenge. In *Miller*, the district court had dismissed an indictment charging the defendant with the interstate shipment of an unregistered shotgun having a barrel less than 18 inches in length, a violation of the Act. The Supreme Court reversed, holding that the second amendment must be interpreted in light of its "obvious purpose" which is to protect the collective right of the people to keep and bear such arms as are necessary to preserve a well regulated militia. The Court concluded that the shotgun involved in this case did not bear any reasonable relationship to the preservation or efficiency of a well regulated militia and thus was not within the ambit of constitutional protection.³¹ The Court did not explain what it meant by "reasonable relationship," nor did it set down any definite guidelines. Courts have disagreed in later decisions whether handguns come under the umbrella of second amendment protection, while most courts agree that it applies to rifles, shotguns, and other conventional long guns.³²

The fifth amendment privilege against self-incrimination confers upon an individual the right to refuse to help the government secure that person's own conviction, where the evidence required to be disclosed by him is likely to lead to his criminal prosecution.³³ Relying on this principle, the Supreme Court decision in *Haynes v. United States*³⁴ cast a fifth amendment shadow over gun control proposals. In *Haynes*, the Court held that the privilege against self-incrimination provided a complete defense to a charge that the defendant failed to register his possession of a designate firearm as required by the National Firearm Act of 1934. Section 5841 of the Act required the registration of various weapons. The possession of a firearm which violated any provision of the Act, including the registration requirement, was declared unlawful. The Court ruled that the government could not subject a defendant to a choice of either registering and thereby admitting possession of an unlawful weapon, or not regis-

29. *Id.* at 178.

30. 307 U.S. 174 (1939).

31. *Id.* at 178.

32. *See, e.g.*, *Cases v. United States*, 131 F.2d 916, 922 (1942).

33. *See, e.g.*, *Emspak v. United States*, 349 U.S. 190 (1955).

34. 390 U.S. 85 (1968).

tering pursuant to section 5841 and thereby risking conviction for possession of a weapon in violation of the Act. The Court did not believe its decision would preclude effective regulation or taxation of firearms, but the decision did manifest the Court's feeling that close scrutiny should be given to registration statutes aimed at "a highly selective group inherently suspect of criminal activity."³⁵

Thus, after the *Haynes* decision, a far greater burden was placed upon the framers of gun control statutes because any registration requirement included within a statute was potentially subject to being stricken on fifth amendment grounds.³⁶ Various alternatives have been employed to avoid this constitutional pitfall. In 1968 the National Firearms Act was amended to provide that information or evidence obtained from an application for registration could not be used as evidence against a registrant in a criminal proceeding with respect to a prior or concurrent violation of the law.³⁷ The Supreme Court has held that this revised statutory scheme does not involve any violation of the self incrimination clause of the fifth amendment.³⁸

Another avoidance technique is that adopted by the gun registration ordinance of the City of Chicago. This ordinance provides that any person possessing a firearm in violation of any Chicago, state, or federal law is not required to register and that any attempted registration is null and void.³⁹ The requirement that legitimate owners must register but that owners guilty of criminal acts are exempted seems absurd on its face; however, because it is impossible for an illegal possessor to register, the prosecution does not have to establish that the evidence is untainted by information from the registration files. If such a person *does* register, he has no fifth amendment claim since his registration was not "compelled."⁴⁰

The United States today still lacks an effective national firearms policy. Federal gun laws have been passed largely as an emotional response to sensational episodes of gun violence. The state statutes comprise a patchwork of over 20,000 different laws relating to firearm restrictions,

35. *Id.* at 98.

36. It is important to note that the Supreme Court has not extended fifth amendment guarantees to states by application of the fourteenth amendment (*Malloy v. Hogan*, 378 U.S. 1 (1964)). However, the second amendment has been incorporated, *see Presser v. Illinois*, 116 U.S. 252 (1886).

37. 26 U.S.C. § 5848 (1970).

38. *United States v. Freed*, 401 U.S. 601 (1971).

39. CHICAGO, ILL., MUNICIPAL CODE ch. 11.1, § 11.1-15 (1972).

40. *See Malloy v. Hogan*, 378 U.S. 1 (1964).

each with its own degree of restrictive severity. The result of these uncoordinated systems is that an estimated 90 million firearms are in civilian hands in the United States (35 million rifles, 31 million shotguns, and 24 million handguns—in 60 million households).⁴¹

In view of the saturation of guns in our society has the Illinois legislative scheme succeeded in keeping them out of undesirable hands? The majority of states do not require a license to purchase or a mandatory waiting period before such license will be issued as is required in Illinois.⁴² Although almost all states, including Illinois, have restrictions as to the legality of certain classes of persons possessing firearms, Chicago is one of the only cities in the country requiring mandatory registration of handguns. Yet, statistics recently compiled by the Chicago Police Department, show a steady increase between 1965 and 1972 in the number of violent crimes committed with firearms.⁴³ It seems that measures more stringent than the prevailing legislative scheme are necessary.

It has been estimated that in crimes involving firearms, handguns are used in approximately 76 percent of all homicides, 86 percent of all aggravated assaults, and 96 percent of all robberies.⁴⁴ Will the new restrictions placed on handguns succeed in reducing these figures? In order to do so, the statute must first clear all constitutional hurdles. The Illinois Constitution provides that "[s]ubject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed."⁴⁵ The commentary on this provision suggests that its intention is to affirm the right of the individual citizen to possess and use arms. This interpretation is opposed to the Supreme Court's view of the second amendment of the United States Constitution, the Court finding that it provides only a *collective* right to possess arms. But the provision explicitly states that the right of the individual to possession is subject to the police power of the state. It has been held by the Illinois courts that this police power extends to the regulation of firearms.⁴⁶ Further, the commentary states that "it was not the intent of the Convention . . . to invalidate laws requiring the licensing of gun owners, the registration of firearms, or the prohibition against carrying concealed weapons."⁴⁷

41. G. NEWTON & F. ZIMRING, *supra* note 6, at 6.

42. *Id.* at 201-40 (Appendix G).

43. *See* Appendix A *infra*.

44. G. NEWTON & F. ZIMRING, *supra* note 6, at 49.

45. ILL. CONST. art. 1, § 22 (1970).

46. *See, e.g.*, *Brown v. Chicago*, 42 Ill. 2d 501, 250 N.E.2d 129 (1969).

47. ILL. CONST. ANN. art. I, § 22 at 678 (Smith-Hurd 1971).

The new Illinois statute is also subject to the fifth amendment proscription against self incrimination as applied to the states through the fourteenth amendment. Since the statute does not include any mandatory registration provision it is distinguishable from the situation found in *Haynes*, and thus no fifth amendment bar exists. The prohibitions of the second amendment do not yet extend to the states under the fourteenth amendnemt so there is little likelihood of any serious constitutional problem in this area.

Taking for granted the fact that the new statute will pass constitutional muster, the most important inquiry is whether or not it will be successful in reducing violent crime, as its sponsors have predicted. The answer is probably in the negative. The most glaring omission in the statute is the fact that it has absolutely no effect on guns presently in circulation. The Act allows the "gift or trade" of any firearm if that firearm was legally held or acquired within six months after enactment.⁴⁸ This is unfortunate since more than half of all handguns are acquired secondhand,⁴⁹ whereas the statute will only regulate the sale of new handguns.

Secondly, the statute does not make illegal the sale of *all* new handguns but only those made from certain materials which make the gun very inexpensive. The statute is thus directed at the sales made to persons who can not afford to purchase an expensive, all-steel handgun. Yet, statistics show that seven-out-of-ten persons earning under \$5,000 per year acquire their gun second hand from a friend or private party.⁵⁰ This leaves only 30 percent of such persons buying cheap handguns brand new in stores and gunshops. It is likely that the vast majority of these persons will be able to secure a handgun from some private party when the supply in the stores diminishes.

A third consideration is the unlikely prospect of effective enforcement of the statute. Since in many instances, the cheap handgun will be almost physically indistinguishable from the more expensive handgun, the state must develop a system whereby the cheap handgun can be readily distinguished from the expensive. Until this is accomplished, enforcement will be difficult.

Fourth, there is a real danger that cheap handguns will be illegally imported into Illinois from states with less strict laws and that a black mar-

48. H.B. 1058, § 1, 78th Ill. Gen. Assembly (1973). P.A. 78-355 (effective October 1, 1973), amending ILL. REV. STAT. ch. 38, § 24-3 (Supp. 1972).

49. G. NEWTON & F. ZIMRING, *supra* note 6, at 15.

50. *Id.*

ket in cheap handguns will develop, thereby diminishing the effectiveness of the statute. As has been pointed out, federal measures have failed to be successful in alleviating this problem of interstate movement of guns.

In order to reverse the present crime rate, the number of handguns in circulation must be effectively reduced. Reduction of the number of guns in circulation will be difficult because of the huge number of guns presently held by the public, and because strong and powerful lobbies such as the National Rifle Association put intense pressure on legislatures, both at the state and federal level, not to enact gun control legislation. Such organizations feel that the second amendment was misconstrued in the *Miller* decision and that there is a basic and unqualified right of the people to bear arms regardless of whether such arms are used by the militia.⁵¹

The NRA and other "anti gun-legislation" advocates feel it imperative that the public be armed for two reasons. First, it is argued that "the common criminal is less likely to pursue his career in an area when he knows many home-owners and businessmen are armed than in an area where honest citizens are disarmed by law."⁵² Statistics do not support such a statement. Studies in several cities indicate that only about two percent of home robberies, and two tenths of one percent of home burglaries, result in the death or injury of the intruder at the hands of the householder employing a firearm.⁵³ Second, it is felt that only an armed populace will prevent a dictatorial takeover. While this rationale might have carried weight during the revolutionary period, it is patently absurd by today's standards. Of what use are handguns and rifles against supersonic jets, bombs, missiles, and tanks?

Legislative bodies must work toward the disarming of the population. This is the only means by which we will see a marked decline in violent crime and accidental injury and death caused by firearms. House Bill 1058, although weak, is the first legislation of its kind in Illinois that generally bans the sale of a particular type of gun to *everyone* in the populace—whether he be a psychopath, criminal, doctor, or businessman. This initial effort is an important step toward disarmament. Furthermore, it hopefully signals the start of a political breakthrough in finally remov-

51. See, e.g., H. Glassen, *Right to Bear Arms is Older than the Second Amendment*, THE AMERICAN RIFLEMAN, April, 1973, p.22 and A. Halsey, *Can the Second Amendment Survive?*, THE AMERICAN RIFLEMAN, March, 1973, at 17.

52. See THE AMERICAN RIFLEMAN, April 1973, p.23.

53. REPORT OF THE COMMISSION, COMM'N FOR THE CAUSES AND PREVENTION OF VIOLENCE, *To Establish Justice, To Insure Domestic Tranquility*, 17 (1970).

ing our political representatives from the influence of the gun lobbyists. The orderly functioning of our society may eventually depend on whether further steps are taken toward these ends in the near future.

Joel S. Kasanov

APPENDIX A

MURDERS: (all types)

| | | | | | |
|------|------|------|------|------|------|
| 1972 | 1971 | 1970 | 1969 | 1968 | 1965 |
| 711 | 828 | 810 | 715 | 647 | 395 |

MURDERS COMMITTED DURING ARMED ROBBERIES

| | | | | | |
|-----|----|-----|----|----|----|
| 104 | 96 | 117 | 68 | 41 | 12 |
|-----|----|-----|----|----|----|

ARMED ROBBERIES

| | | | | | |
|--------|--------|--------|--------|--------|-------|
| 14,791 | 14,911 | 14,473 | 12,269 | 10,215 | 7,338 |
|--------|--------|--------|--------|--------|-------|

SERIOUS ASSAULTS BY SHOOTING

| | | | | | |
|-------|-------|-------|-------|-------|-------|
| 3,483 | 3,523 | 3,652 | 3,145 | 2,839 | 1,298 |
|-------|-------|-------|-------|-------|-------|

Statistics compiled by the
Chicago Police Department.